MANDATORY INJUNCTIONS.[1]

IN the whole range of English and American remedial jurisprudence there is no subject which illustrates and demonstrates more strikingly than the equitable remedy of injunction the evolutionary principles which are incessantly at work in the development of the law. Equity itself, now a splendid and orderly system of remedies, was born of necessity, and underwent a constant, and sometimes an unequal, struggle for existence and supremacy during the past two hundred and fifty years. The legal remedies were unyielding in their forms, and because of their unyielding forms were inapplicable in an ever-enlarging class of cases where rights were to be preserved, duties and obligations enforced, and wrongs and injustice prevented. Where the legal remedies were inadequate, incomplete, or wholly wanting, there equity gradually began to exert itself in the application of new remedies, so that wrong and injustice might not prevail over right and justice for the lack of an efficient remedy.

It is to be regarded as one of the glories of our English and American law that this evolution and development, this reaching out after more ample and complete remedies, this working together of vital forces towards a more and more perfect and harmonious system of remedial justice, is still going on; and that no one having a just cause need fear that he must suffer or endure a wrong for the want of a sufficient remedy.

"It is the duty of a court of equity," said Lord Cottenham, in Taylor *v.* Salmon[2] (and the same is true of all courts and institutions), "to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily made in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."

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[1] This paper was read by Judge Klein at the meeting of the Missouri Bar Association in Kansas City, Mo., March 30, 1898. — ED.

[2] (1838) 4 Mylne & Cr. 134.

This is the view constantly acted on, although not often expressed. But when the courts are pressed upon the subject they respond in unmistakable terms. These tendencies are well illustrated, and the true spirit of equity jurisprudence breathes, in the opinion delivered by Judge Ross of the United States Circuit Court of Appeals, Ninth Circuit, in the case of Northern Pacific R. R. Co. *v.* Hussey.[1] In that case the plaintiff, under an act of Congress, was entitled to every odd section of certain lands on each side of its railroad line, the lands to be surveyed by the United States. Before this survey was made, and before, therefore, the railroad company could know which particular sections of land it would be entitled to, the defendant, a mere trespasser, entered upon the lands and cut timber therefrom in such manner that the denuded portions would fall within the odd as well as the even sections when the survey would be made. And he was continuing these acts of trespass when the plaintiff sought an injunction to restrain these acts, which was denied by the court below.

The lands in question were valuable alone for the timber that grew upon them, and to cut down, destroy, or carry away the timber thereon was, therefore, essentially to destroy and take away the very substance of the estate. Here the plaintiff had no title to particular lands, and therefore could not maintain any action for damages for the asportation of any particular tree or trees. "The case," said the court, "is a novel one, it must be admitted; but when so great a wrong is being perpetrated, as must be taken to be true for the purposes of the present decision (a demurrer to the bill had been sustained below), and the party seeking to prevent the wrong has no adequate remedy at law, equity, we think, will afford the remedy. '*Ubi jus ibi remedium*' is the maxim which forms the root of all equitable decisions." He then quoted with approval the language of Ricks, District Judge, in Toledo, etc. Ry. Co. *v.* Pennsylvania Co.,[2] in which a mandatory preliminary injunction had been granted, and certain parties were before the court on a motion to punish them for contempt in violating the orders which had been made: "It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time without a precedent. If

[1] (1894) 61 Fed. Rep. 231.

[2] (1893) 54 Fed. Rep. 746, 751.

based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome to the Chancellor to meet the constantly varying demands for equitable relief."

The duty of a court of equity to devise new remedies and to extend its aid to meet new emergencies is recognized also in Joy *v.* St. Louis,[1] in these words: "It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation.

And Mr. Justice Brewer is quoted by Judge Ricks as saying, "I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex relations and the protection of rights can demand." [2]

It is not intended in this paper to deal with the remedy of injunction generally. Every lawyer is often called upon to invoke that remedy, and early in his practice becomes acquainted with the general principles controlling its application and ultimate efficiency. We are to deal here with the most efficient of all forms of injunctions, viz.: —

MANDATORY INJUNCTIONS.

A mandatory injunction is one that commands a party, plaintiff or defendant, to perform a certain act or acts. It is singular that while courts of equity have frequently granted this particular remedy, they seem, nevertheless, to have stood, at all times, in a sort of dread respecting it, and to have viewed it with a kind of prejudice; so much indeed that we find it stated by eminent judges, as we shall see, that a temporary injunction in mandatory form is not to be granted at all.

The form adopted at an early day for injunctions of this sort was negative instead of positive. It restrained the defendant from permitting a condition of affairs which he had wrongfully brought about, occasioned or suffered to exist, from continuing any longer; and this compelled him to do the acts necessary to bring about a discontinuance of the wrongful state of things produced by him,

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[1] (1890) 138 U. S. 1, 50.

[2] See 54 Fed. Rep. 751.

under the fear of attachment, sequestration of property, or other punishment for disobedience. But no good reason exists for this roundabout, hesitating method of procedure. What the law declares to be just and proper to be done, the courts should require to be done in a positive and direct, as well as an effectual manner. This view of the matter has been forcibly presented by Sir George Jessel, Master of the Rolls, a very learned and eminent equity judge in a case requiring a mandatory injunction. "As to mandatory injunctions," said that eminent jurist, "their history is a curious one, and may account for some of the expressions used by the judges in some of the cases cited. At one time it was supposed that the court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution. Every judge ought to exercise care, and it is not more needed in one case than in another.

"In looking at the reason of the thing, there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the court never has any hesitation in enjoining him. What difference could it make, if instead of fouling it day by day, he stopped it altogether? In granting a mandatory injunction the court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted, the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately reinstate the persons injured, the court said, as in cases of specific performance, 'We will put you in the same position as before the injury was done.' When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it, before the bill was filed? It could make no difference, where the plaintiff's right remained and had not been lost by delay or acquiescence." Finding the case under consideration a proper one for a mandatory injunction, he suited his action to his words and granted the order in accordance with the prayer, requiring the

defendant to take down and remove a building which interfered with the access of light and air to the plaintiff's home, as he was entitled to enjoy the same.[1]

It is quite common to say that a mandatory injunction is very seldom granted upon an interlocutory application or before final decree. Indeed, so careful and learned a jurist as Judge Sharswood stated in one case[2] that "the authorities, both in England and in this country, are very clear that an interlocutory or preliminary injunction cannot be mandatory." In support of this broad statement he cites the case of Gale *v.* Abbott,[3] where Vice-Chancellor Kindersley said: "It was useless to come for what was called a mandatory injunction on an interlocutory application. Such an application was one of the rarest cases that occurred, for the court would not compel a man to do so serious a thing as to undo what he had done, except at the hearing."

Let us suppose for a moment that this is the real condition of our remedial justice, what grave mischiefs would a plaintiff have to suffer at the hands of an unscrupulous defendant who had the temerity to accomplish a destruction of the plaintiff's right before he had an opportunity of applying to the court for its protection? A case well illustrating the serious consequences that would follow from such a view recently occurred in the Circuit Court of the city of St. Louis, where a mandatory temporary injunction was applied for under these circumstances.[4] The plaintiff was, and for many years had been, the owner of a considerable tract of land in the northwestern part of the city. Upon this he had his residence, a costly structure, and the usual outhouses. Near the dwelling he had his gardens, and in the midst of these there was a natural sheet of water covering, perhaps, two or three acres of his land. This sheet of water had existed time out of mind, and was an attractive feature of the plaintiff's homestead. It was fed by springs of pure water, as well as by the surface water of the plaintiff's land; but it had never been known to overflow its banks. Leading from this sheet of water there had always been a well-defined natural water-course, which carried off the surplus water from the little lake, and kept it at a uniform level. This condition of things had always existed, and the plaintiff's residence, outhouses, and gardens had

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[1] Smith *v.* Smith (1875), L. R. 20 Eq. 500.

[2] Audenried *v.* Phila. & Reading R. R. Co. (1871), 68 Pa. St. 370, 375, 376.

[3] (1862) 8 Jurist, N. S. 987.

[4] Filley *v.* Bambrick (1895), No. 92,462, Circuit Court, city of St. Louis.

been located and arranged with reference thereto. The little watercourse meandered through the plaintiff's land and the land of adjacent owners for a distance of about one thousand yards, and then suddenly disappeared from view. But the water flowed constantly, and it was plainly to be seen that the stream continued on in a subterraneous channel. Some distance away from the place where the watercourse disappeared, the defendant owned and operated a quarry. When he had reached a level of forty or fifty feet below the natural surface, he found a constant stream of water discharging itself from an aperture in the face of his quarry, and this interfered very seriously with his quarrying operations. It had been observed by persons interested in the matter that small sticks of wood which were put into the little stream where it left the plaintiff's lake, found their way and were discharged into the defendant's quarry through the aperture in its face just mentioned. The defendant then conceived and immediately executed a plan to relieve himself of the annoying water by firmly and effectually "plugging up" the aperture in the face of his quarry, and thus stopping the flow of the subterranean stream. The consequence of this action on the part of the defendant was that the water in the plaintiff's lake soon began to rise, and it kept on rising until it threatened to overflow its banks, and to inundate his gardens, driveways, walks, and houses, so as to render the place uninhabitable. At this stage of affairs he applied to the court for a mandatory temporary injunction against the defendant, requiring him to undo what he had done; to remove the obstruction he had put in the way of the subterranean stream that flowed into his quarry, and restraining him from interfering with the outflow of water through the opening in the face of his quarry. The order was granted as prayed, and the threatened wrong and mischief, and the irreparable injury which would have otherwise resulted to the plaintiff, was averted.

Suppose that the Chancellor had said in this case, "I will not compel the defendant to do so serious a thing as to undo what he has done, until the final hearing." Before the final hearing, the ruin of the plaintiff's estate would have been accomplished, and the defendant would have been permitted to enjoy the fruits of his own wrong, as the result of a lamentable defect in remedial procedure.

In the Pennsylvania case above mentioned, Judge Sharswood was forced to admit that there were some few instances in England in which a mandatory order was made on an interlocutory application, but he said these cases should not be followed as precedents.

The cases cited by him are The Attorney-General *v.* The Metropolitan Board,[1] and Hepburn *v.* Lordan.[2] In the first of these cases the defendants were constructing a system of sewers, to drain the sewage of a town into the river Lee. The effect of the work accomplished was to cause an obstruction to the navigation of the river. They were enjoined from continuing the discharge of sewage in this manner, and required to dredge the river so as to free it from the obstruction already existing. This order was made upon an interlocutory motion. In the second case a lot of damp jute had been stored and dried by the defendant on premises adjoining the plaintiff's house, at the imminent risk of combustion. The defendant was ordered to remove it.

Another case cited by Judge Sharswood, in Audenried *v.* Phila. & Reading R. R. Co., is the leading case of Lane *v.* Newdigate.[3] There the plaintiff was assignee of a lease that had been granted by the defendant for the purpose of erecting mills and other buildings; the lease contained covenants for a supply of water for the mills and works, from canals and reservoirs on the defendant's estates. The lessor suffered the canals and reservoirs to get out of repair, and was diverting the water of the canals, and by removing certain stop-gates drained the mill pool and canals so as to render the lessee's privileges useless. Lord Eldon, on the authority of Robinson *v.* Lord Byron,[4] held that there was no objection to requiring repairs to be made, although some doubt was expressed on the matter. As to the restoration of the stop-gate, the Lord Chancellor said: "The question is whether the court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction I shall order will create the necessity of restoring the stop-gate, and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works." An order was framed accordingly.

In marked contrast to the vigorous sense of justice that is exhibited in the passage above quoted from the opinion of Sir George Jessel, in Smith *v.* Smith, Judge Sharswood makes the following comment upon these observations of Lord Eldon: "That is acknowledging that he could not, according to the principles and practice of the court, order the defendant in direct terms to restore

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[1] (1863) 1 Hem. & Miller, 298, 321.
[2] (1865) 2 Hem. & Miller, 345.
[3] (1804) 10 Ves. 192.
[4] (1785) 1 Bro. C. C. 588.

the stop-gate and repair the works; the injunction should be so drawn that, although on its face restrictive only, it will, in order to comply with it, compel him to do these very things. This is not a precedent which ought to be followed in this or any other court. A tribunal that finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection."

These divergent views upon this subject serve to emphasize the difference in their mental attitude towards the essential aims of administrative or remedial justice, between a lawyer bred in the common-law courts, and accustomed to their technical and formal limitations, and one bred in the courts of equity, which do not ordinarily permit a mere technical rule, or a shortcoming of ordinary remedies or forms, to stand in the way of administering justice in its full sense and scope. In truth, the notion advanced by Judge Sharswood, that a preliminary mandatory injunction was an unheard-of procedure, was without any just foundation, as was pointed out by Vice-Chancellor Stuart, in Beadel *v.* Perry.[1] "Reference has been made," said that learned Vice-Chancellor, "to a supposed rule of court that mandatory injunctions cannot properly be made except at the hearing of the case. I never heard of such a rule. Lord Cottenham was, so far as I know, the first judge who proceeded by way of mandatory injunction, and he took great care to see that the party applying was entitled to relief in that shape."

The history of the development of the jurisdiction to grant mandatory injunctions is curious, as was observed by Sir George Jessel, in Smith *v.* Smith; but it was a necessary jurisdiction, and was gradually enlarged so that it may now be fairly regarded as sufficiently comprehensive to embrace every case in which equity and justice, which go inseparably together, really require the writ. And we shall presently see that wherever the wrong complained of affects the legal or equitable rights of the plaintiff seriously and to such an extent as to be irreparable, or wherever the continuance by the defendant of the injury, the commencement of which has brought the plaintiff into court for relief, would lead to the waste or destruction of the property, before final hearing, a court of equity will interfere by mandatory injunction on an interlocutory application, in all cases where this special jurisdiction of the court is needed to restore the property to that condition in which it existed immediately preceding the commencement of the wrong, or to bring

[1] (1866) L. R. 3 Eq. 465.

the matter in controversy back to the position from which the defendant's wrongful act has changed it, so that it may be preserved until the final decree. If it were otherwise, the administration of justice would be defective, which a court of equity is the last to admit.

It appears that from an early day the High Court of Chancery took jurisdiction to prevent by injunction the ploughing up of ancient pasture lands, and the early entries of restraining orders of this nature are collected in Tothill's Reports, pp. 143, 144. Among these is to be found the case of Rolls *v.* Miller,[1] which is probably the earliest instance of an order in chancery looking to a mandatory injunction; for in that case it appears that not only was the defendant restrained from ploughing up the pasture lands, but he was ordered to show cause why he should not lay down again that which he had ploughed.

Doubtless there are many instances in which the court exercised the jurisdiction to grant mandatory injunctions from that time forward. At any rate in 1716 the jurisdiction was no longer questioned, and it was applied by Chancellor Cowper, in the famous case of Vane *v.* Lord Barnard.[2] The circumstances of that case were these: The defendant on the marriage of the plaintiff, his eldest son, with the daughter of Morgan Randyll, and £10,000 portion, settled Raby Castle on himself for life, *without impeachment of waste*, remainder to his son for life, and to his first and other sons in tail male. Lord Barnard, having taken some displeasure against his son, got together two hundred workmen, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, boards, etc., to the value of £3,000. On the filing of the bill the court granted an injunction to stay the committing of waste in pulling down the castle. This injunction was made perpetual on the hearing of the case, and it was decreed that the castle should be repaired and put into the same condition it was in before the acts of waste were begun; and for that purpose a commission was issued to ascertain what ought to be repaired, and a Master was appointed to see it done at Lord Barnard's expense. It is to be observed that the court, possibly foreseeing the difficulty it might encounter in compelling the defendant to do the necessary work of restoring the castle, did this work itself.

[1] (1640, 15 Chas. I.) Tothill's Rep. 144.

[2] (1716) 2 Vernon, 738; also reported as Lord Barnard's Case, Precedents in Chancery, 454.

Robinson *v.* Lord Byron[1] is generally cited as the earliest instance of a mandatory injunction. There a mandatory order was granted by Lord Chancellor Thurlow to restrain the defendant from preventing water flowing in regular quantities to the plaintiff's mill. The defendant could by means of stop-gates and flood-gates, maintained on his estates, prevent the water of the stream, on which the plaintiff's mill depended, from going to the mill in sufficient quantities for its operation, or inundate the plaintiff's land, which he had done on several occasions. He was restrained from permitting things to remain as they were.

In Rankin *v.* Huskisson,[2] a preliminary injunction was granted to restrain the defendant from building on part of a place adjacent to a plot leased to the plaintiff with a covenant that the ground adjoining the lot leased to him should be laid out and used as a garden, and no building whatever be erected thereon. In violation of this covenant the defendants commenced the erection of buildings in the garden site. The injunction restrained the defendants from completing the houses, and from permitting such part of the buildings as had already been erected on the garden site to remain thereon, until, etc.

In Blakemore *v.* The Glamorganshire Canal Navigation,[3] Lord Chancellor Brougham intimated that on an interlocutory application for an injunction, the court will only act prospectively, and with a view to keep matters *in statu quo*, and will not, unless in a very special case, grant the order in such form as indirectly to compel some positive act to be done by the party enjoined. And he took occasion to remark that he agreed with the view that if the court has this jurisdiction, it would be better to execute it directly and at once.

In the North of England Junction Railway Co. *v.* Clarence Railway Co.,[4] the defendant sought to prevent the plaintiff from constructing a bridge over its railway tracks, as plaintiff was authorized to do by act of Parliament, by erecting walls in such a position as to interfere with the erection of the bridge and the crossing of the defendant's railway over the same. A mandatory temporary injunction, in effect compelling the defendant to pull down these walls, so that plaintiff might proceed with the construction of its bridge, was granted by Vice-Chancellor Shadwell, who said: "It has been said that the injunction now sought is wholly man-

[1] (1785) 1 Bro. C. C. 588.
[2] (1830) 4 Sim. Rep. 13.
[3] (1832) 1 Mylne & Keen, 154.
[4] (1844) 1 Collyer's Rep. 507.

datory, and therefore proper to be refused. That injunctions in substance mandatory, though in form merely prohibitory, have been and may be granted by the court is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary, under certain circumstances, to be exercised. Under what circumstances it should be exercised must be matter for judicial discretion, in each several case."

In Goodale *v.* Goodale,[1] an injunction was granted, before answer, to restrain defendants from parting with documents in their possession, belonging to the plaintiff, and from preventing her solicitor from having access to the documents at all reasonable times, and after reasonable notice.

Where the defendant had obstructed the passage of smoke from flues used by the plaintiffs for several years, but their right to which was doubtful, by placing tiles upon the top of the chimney-pots, a mandatory injunction was granted upon interlocutory motion, by Vice-Chancellor Wood, to compel defendant to remove the tiles.[2]

In Durell *v.* Pritchard,[3] the mandatory injunction prayed for was refused, but the jurisdiction of the court to grant the same in proper cases was asserted. It was contended in this case that a mandatory injunction should not be granted where the damage was complete before the filing of the bill; but the court held that relief by way of injunction ought not to have been refused upon the mere ground that the damage had been completed before the bill was filed. "The authorities upon this subject," said the court, "lead, I think, to these conclusions: that every case of this nature must depend upon its own circumstances, and that this court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld." The matters complained of by the plaintiff were interferences with an easement of way and an easement of ancient light, but the interferences were found not to be extreme or serious, and plaintiff was permitted to sue at law for his damages.

In the more recent English cases we find the judgments of the

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[1] (1848) 16 Sim. 316.
[2] Hervey *v.* Smith (1855), 1 Kay & John. 389.
[3] (1865) L. R. 1 Ch. App. 244.

Court of Chancery largely influenced by Sir H. Cairns Act,[1] an act of Parliament authorizing the court under certain circumstances to grant relief by way of damages, instead of relief by way of injunction. This was done in Senior *v.* Pawson,[2] where the defendant had erected a house which seriously interfered with the plaintiff's light and air. But as the plaintiff heard of the intended structure in April, and did not complain until November following, during which time defendant had laid out large sums; and the plaintiff had also, since the filing of the bill, offered to take a money consideration, — an injunction was refused and an inquiry of damages was ordered under the act just mentioned. The Vice-Chancellor, in passing on the case, said that he had no doubt as to the jurisdiction of the court to order the buildings to be pulled down, but considered it expedient under all the circumstances of the case to grant relief in damages instead.

Reference has already been made to Beadel *v.* Perry.[3] In that case the defendant had commenced the erection of a wall which was likely to interfere with plaintiff's light and air, and plaintiff promptly sought the aid of the court for an injunction to restrain defendant from allowing the wall to continue of a height which would interfere with the access of light and air to plaintiff's windows, etc. An injunction was granted with leave to move for a mandatory injunction. Defendant continued his construction of the wall, and the motion for a mandatory injunction was made. Vice-Chancellor Stuart, having heard the evidence, said that defendant had built his wall much higher than he had the right to do, and to that extent must take it down. "There must be a mandatory injunction to that effect." Then follows the statement already quoted,[4] and he continues: "Looking at all the circumstances of this case, I feel that I am bound to make an order for a

[1] 21 & 22 Vict., ch. 27 (June 28, 1858). This act is also cited as "The Chancery Amendment Act, 1858," 98 Stat. at Large, 72. By the 2d section of the act it is provided that: "In all cases in which the Court of Chancery has jurisdiction to entertain an application against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct." The remainder of the act provides for the mode of procedure in the assessment of damages.

[2] (1866) L. R. 3 Eq. Cas. 330.

[3] (1866) L. R. 3 Eq. Cas. 465.

[4] *Ante*, page 102.

mandatory injunction. If I did not do so, the injury which has been inflicted upon the plaintiffs, though partly before the bill was filed, would be continued;" and an order was made accordingly.

In Westminster Brimbo Coal and Coke Co. *v.* Clayton,[1] the barrier between two mines had been perforated, and the owner of one of them artificially conducted the water of his mine so as to pass by the perforations into the other mine, that mode of removing the water from his mine being most beneficial to himself. The result was irreparable injury to the plaintiff. On an interlocutory application a mandatory injunction was granted, so as to bring things back into the state in which they were *ante litem motam*, and keep them there until the hearing. "The defendant is not at liberty by a new course of action to do irreparable damage to the plaintiff, and then, when the bill is filed, to say, 'The *status quo* shall be the state of things after the act is done.'"

In Cooke *v.* Chilcott,[2] a purchaser of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building-sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land. It was held by Vice-Chancellor Malins, that although the covenant was not one of which the court could decree specific performance, as being for the construction of works, which the court could not superintend, it could be enforced indirectly by an injunction restraining defendant from allowing the work to remain unperformed. This was upon the authority of Storer *v.* Great Western Ry. Co.,[3] and Lane *v.* Newdigate.[4]

It would extend this article beyond reasonable limits to undertake here to mention the very numerous cases in the American reports in which mandatory injunctions have been granted. They all proceed upon the theory that where the circumstances of the case require this extraordinary remedy in order that justice may prevail, it will be granted. Many of the cases are collected and stated in a comprehensive and valuable note to the case of City of Moundsville *v.* Ohio River R. R. Co.,[5] and in an excellent note to Murdock's Case.[6]

I desire merely to refer to a few cases which tend to show how firmly the jurisdiction is now established, and how necessary it is

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[1] (1867) 36 L. J. Ch. 476.
[2] (1876) L. R. 3 Ch. Div. 694.
[3] (1842) 2 Y. & C. Ch. 48.
[4] (1804) 10 Ves. 192.
[5] (1892) 20 L. R. A. 161; 37 W. Va. 92.
[6] (1829) 20 Am. Dec. 381; 2 Bland Ch. 461.

for a complete system of remedial jurisprudence. There seems still to be some conflict over the question whether a mandatory injunction may or should be granted on an interlocutory application; but the outcome of this conflict is inevitable, for the forces which are at work are irresistible, and will not rest until efficient and necessary remedies are established to meet every form of wrong, of which law and the courts can take cognizance.

Among the early American cases in which the matter is discussed is Murdock's Case.[1] In that case the plaintiff had purchased certain lands under a decree in chancery, and had been put into possession thereof by a writ of *habere facias possessionem;* but the defendant Murdock had erected, and persisted in continuing to erect, a fence so as to include part of the tract so purchased by plaintiff. It was stated in the bill that plaintiff had brought an action of trespass *quare clausum fregit* against defendant, which was still pending, and there was a prayer for an injunction prohibiting defendant "from continuing the said fence, and enjoining him to remove the said fence already erected," and for further relief. The court refused to grant a temporary injunction requiring defendant to remove the fence already erected, but enjoined him from completing it until the further order of the court. It will be seen that there were no special circumstances in the case requiring an immediate removal of the fence, and so the ruling of Chancellor Bland was quite correct. But he put his denial of the writ upon the ground that before imputed wrong can be removed, or anything like commutative justice can be administered, it is the duty of the court to give the party complained of an opportunity of being heard; that to order a defendant to pull down or remove any erection would be obviously and directly to deprive him of a portion of that which then, at least, appeared to be his property, and was so claimed by him. And it was his view that injunctions should be granted only in so limited a form as expressly or in terms to require no alteration in the existing state of things, or anything to be undone or restored, except in so far as a restoration may consequently follow as a necessary result of the merely restrictive operation of the injunction.

But in this very case, pragmatic trespassers having continued the construction of the fence after the preliminary injunction had been awarded, it was ordered upon a motion to attach and punish

[1] (1829) 2 Bland Ch. 461; s. c. with note on mandatory injunctions, 20 Am. Dec. 381.

them and defendant for a violation of the writ, that these trespassers should, and they were commanded and required, without delay, to take down and remove the fence erected by them.

It is the experience of every lawyer that in the examination of the decided cases on any subject he will constantly meet with *obiter dicta* in the opinions of the judges. These are often productive of mischief; but the main objection to them is that they tend to introduce uncertainty and confusion into the law. And so we often find broad statements, unnecessary to the decision of the case, announcing a general proposition which has no just foundation in the law. Thus, in a recent case, the defendant had erected a line fence between his own and the plaintiff's house; the houses were about two feet apart, and the line was midway between them. Defendant erected a board fence on the line, to the height of sixteen feet, shutting off the light from complainant's windows, and it was alleged that this was maliciously done. On a motion for a preliminary injunction the writ was granted, and defendant was commanded to at once take down or remove the fence, and not to renew, rebuild, or continue the same. Now it is quite plain that the case did not present the exigencies demanding an immediate alteration of affairs; and so the court might have ruled and no ill consequences would follow from the ruling. But it was decided by the Supreme Court that the court below had no power to determine the rights of the parties on affidavits, or on a motion for a preliminary injunction. This could only be done on final hearing. All this is quite true, but the mischief lies in this, that we now find the case cited as an authority for the proposition that a mandatory injunction should not be granted on preliminary hearing.[1]

Let us briefly consider the circumstances in a few of the American cases, which have called forth the aid of a court of chancery through this extraordinary remedy: —

In Pierce *v.* City of New Orleans,[2] the plaintiff and defendant were tenants in common of a wall, which had always been a blank wall, and which stood adjacent to and in the rear of plaintiff's dwelling-house and yard. Without the plaintiff's consent the defendant made certain openings in this wall, thereby creating a nuisance which affected indefinitely the privacy of plaintiff's family residence so seriously as to inflict irreparable injury. A preliminary injunction was granted upon motion, and defendant was ordered to close

[1] Ladd *v.* Flynn (1892), 90 Mich. 181 ; cited in note, 20 L. R. A. 161.

[2] (1866) 18 La. Ann. 242.

up the openings in the wall, and to restore the same to its original condition, and keep it so during the pendency of the suit.

A case arose before Sawyer, Circuit Judge, in the District of Nevada, between two mining companies.[1] The plaintiff, in excavating a tunnel in the mountain to its mining claim, struck a subterranean flow of water, which it appropriated and enjoyed for several years. The defendants ran a tunnel from a distant point into the mountain, to a point about thirty feet directly under the point where the plaintiff obtained this water; thereupon the water, which before flowed through the plaintiff's tunnel, was intercepted and discharged through defendants' tunnel, and by them appropriated to their own use. Upon a motion for an interlocutory mandatory injunction, it was urged, in opposition, that the injury had been committed, and that, this being so, the court would not, on motion for a preliminary injunction, issue a mandatory writ, affirmatively commanding the performance of an act, such as to fill up a tunnel, rebuild a wall that has been demolished, and the like. The learned judge in disposing of the motion was inclined to the opinion that the authorities were to this effect. But after citing Robinson *v.* Lord Byron, Lane *v.* Newdigate, and other cases to which I have called your attention, he said: "Under these authorities, by whatever name judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, even though it should be necessary for them to fill up or build a water-tight barrier across the tunnel to accomplish the end sought." An order was framed accordingly, and this ruling was approved on a motion to dissolve the injunction, by Mr. Justice Field. The case may be regarded as a leading case on the subject.

A bill was filed, wherein the plaintiff sought an injunction against obstructing a passageway over and upon which he had a right to pass and repass. Plaintiff owned the land on one side and defendant on the other, and the passage was about five feet wide, running from one of the streets in Boston, between the two parcels of land. Defendant had begun the erection of a wall of a building within this passage. A preliminary injunction was denied, and the defendant completed the wall. Upon final hearing the merits were found to lie with plaintiff, and a mandatory injunction was granted, commanding defendant to take down the wall and so alter

[1] The Cole Silver Mining Co. *v.* Virginia & Gold Hill Water Co. (1871), 1 Sawyer, 470, 685.

his building as to leave the passageway unobstructed, and to pay the plaintiff the damages suffered pending the suit, on account of the encroachment. "The defendant having by the service of process," said the court (Gray, Chief Justice), "full notice of the plaintiff's claim, went on to build at his own risk; and the injury caused to the plaintiff's estate by the defendant's wrongful act being substantial, a court of equity will not allow the wrongdoer to compel innocent persons to sell their right at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition."[1]

I have already mentioned the case of Coe *v.* Louisville & Nashville R. R. Co.[2] That case is typical of many others in which the mandatory injunction was the remedy applied to bring about the performance of duties or contracts by railroads and other common carriers, and to regulate matters relating to commerce. Many such cases are stated in the note to Moundsville *v.* Ohio River R. R. Co.[3] In the Coe case the plaintiff had purchased a lot contiguous to defendant's depot in Nashville, and fitted up a stock-yard thereon at considerable expense. There was no express contract between plaintiff and the railroad company in relation to the matter; but the yard was and had been a convenience to the defendant's business, and by defendant's permission or acquiescence it was connected with the railroad by gaps and pens. After the yard had been used by both parties for more than twelve years, the defendant entered into a contract with the Union Stock Yard Company for the erection of a stock-yard outside the city limits, more than a mile distant from plaintiff's yard; and among other things defendant agreed with this stock-yard company that it would deliver all stock shipped to Nashville at this new yard, and that it would not deliver it at any other point in the city. The railroad company accordingly notified the plaintiff that it would not deliver stock shipped to him at his yard after a specified date. Thereupon the plaintiff filed his bill in which he prayed for an injunction to restrain defendant from interfering with or in any manner disturbing the enjoyment of the facilities now afforded to complainant by defendant upon its lines of railway, for the transaction of business, and from refusing to deliver stock at plaintiff's yard, and from interfering with or in any way disturbing the business of plaintiff,

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[1] Tucker *v.* Howard (1880), 128 Mass. 361.

[2] (1880) 3 Fed. Rep. 775.

[3] (1892) 20 L. R. A. 161, 166.

and from refusing to permit the plaintiff to continue on the same terms as heretofore. The injunction was granted as prayed. The court considered that the urgency of the case demanded it. The duty sought to be enforced was one imposed and defined by law, and a suspension of the accommodations enjoyed by the plaintiff would work irreparable mischief.

A telephone company unlawfully and without the consent of the owner, but against his protest and warning, set up poles upon his land. He promptly applied to the court for an injunction; but, before the order to show cause could be served upon the company, it completed the setting of the poles. When the matter came on for hearing on the order, the defendant urged that the temporary injunction, if granted, should not require it to remove the poles, but only restrain it from putting on the cross-bars and wires. To this the Chancellor answered: "The fact that the setting of the poles is finished is due to the activity of the defendants in completing the work. Where a defendant thus invades the proprietary rights of a complainant he has no ground for asking that the court will give him the benefit of his activity and persistence in wrongdoing. . . . Where there is a deliberate, unlawful, and inexcusable invasion, by one man, of another's land, for the purpose of a continuing trespass for the trespasser's gain or profit, and there has been neither acquiescence nor delay in applying to this court for relief, the mere fact that the trespass was complete when the bill was filed will not prevent an injunction mandatory in its nature, against the continuance of the trespass." The writ prohibited the defendants from setting any poles on the lands of the plaintiff, and from allowing those which they had placed thereon to remain.[1]

Plaintiffs and defendants were occupants of different parts of the same house under the same landlord. The defendant occupied the basement, in the rear of which was situated a furnace, which by means of pipes and registers furnished heat to the plaintiff's apartments on the first and second floors. The use of the furnace was granted plaintiff by his lease, and defendant knew this, and for years had acquiesced in plaintiff's right to pass through the defendant's shop to give the necessary attention to the furnace. There was no other means of access to the furnace. One day the defendant notified the plaintiff that he would not, after a specified date, be permitted to pass through the shop to the furnace. This

[1] Broome *v.* N. Y. & N. J. Telephone Co. (1886), 42 N. J. Eq. 141.

brought the plaintiff into court for an injunction. A mandatory temporary injunction was granted commanding the defendant to permit the plaintiff to pass through the shop of defendant in such manner and at such times as might be necessary to give such care and attention to the furnace as might be required for the use thereof in heating the plaintiff's rooms.[1]

It is curious in what manner these cases present themselves, and how the admirable flexibility of the equitable remedy is frequently taxed by ingenious arguments in favor of the wrongdoer. But equity considers the substance of things and adapts its remedies to the exigency of each case. An important illustration of this principle, as well as of the special jurisdiction we are now considering, is to be found in Wheelock *v.* Noonan.[2] There the plaintiff gave to the defendant a parol and gratuitous license to place upon certain unoccupied lots of his in the northern part of New York City a few rocks, under the defendant's promise that he would remove them in the spring following. During the winter and without the plaintiff's knowledge the defendant covered six of the lots with heavy boulders to the height of from fourteen to sixteen feet. In the spring, plaintiff discovering what had been done, directed the defendant to remove the rocks. Defendant having failed to do this, the plaintiff filed his bill to compel him to do so. The court awarded judgment requiring the defendant to remove the rocks by a specified day, unless for good cause shown the time should be extended by the court. It was contended that the plaintiff could have removed the stone himself and then recovered of the defendant the expense incurred. "But," said the court, "to what locality could the owner remove them? He could not put them in the street; . . . and it would follow that the owner would be obliged to hire some vacant lot or place of deposit; become responsible for the rent; and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such a burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority." The judgment of the lower court was affirmed.

The jurisdiction of a court of equity to grant injunctions mandatory in effect has been recognized by the Kansas City Court of Appeals, in Sedalia Brewing Co. *v.* Sedalia Water Works Co.,[3]

[1] Hodge *v.* Giese (1887), 43 N. J. Eq. 342.
[2] (1888) 108 N. Y. 179.
[3] (1889) 34 Mo. App. 49.

and by the St. Louis Court of Appeals in Albers *v.* Merchants' Exchange.[1]

In the former case the defendant was compelled by an injunction, negative in form but mandatory in effect, to continue to furnish water to the plaintiff's brewery, under the terms of an existing contract, which defendant was about to violate and disregard, to the plaintiff's irreparable injury. In the latter case, the Merchants' Exchange had wrongfully suspended the plaintiff and were excluding him from attending the Exchange to transact his business there. A mandatory temporary injunction granted by the Circuit Court was made perpetual on final hearing, and defendant was restrained from excluding plaintiff from the privileges of the Exchange.

And so it has been held that a mandatory injunction to remove a wall encroaching on another's property may be granted, and the obligation to remove placed directly on the party who caused the wall to be erected.[2] In this case the wall encroached nine inches upon a narrow passageway belonging to the plaintiff, and seriously interfered with its use. It was contended that the plaintiff had an adequate remedy by ejectment. But the court said: "The sheriff might not regard it as his duty to deliver possession by taking down the wall, which would burden him with the risk of injury to other portions of defendant's building, not included within the nine inches. But in equity the obligation to remove can be placed directly on the party who caused the wall to be erected, and it frequently affords relief in such cases."

The Supreme Court of Pennsylvania has not adhered to the doctrine laid down by Judge Sharswood. In a recent case, where a natural gas company made a contract with the owner of glass works to supply him with gas for fuel for all purposes connected with the manufacture of his wares, so long as natural gas may continue to be produced from the territory then or thereafter owned or operated by the gas company, on a bill averring that plaintiff had relied on this contract, and constructed his works for the use of natural gas only as fuel, and that the company had shut off the entire supply while the works were in operation, thereby making irreparable damage imminent, the court held that it was error to refuse a preliminary injunction mandatory to the extent of restor-

[1] (1890) 39 Mo. App. 583.

[2] Baron *v.* Korn (1891), 127 N. Y. 224 (27 N. E. Rep. 804).

ing the *status quo.* The judgment of the lower court was reversed with directions to grant the mandatory injunction indicated.

Where two persons were jointly entitled to the use of a pipe, which supplied their respective apartments in a double house with water, and defendant was about to shut off the water, and had actually stopped the water-pipes and prevented the flow of water to the plaintiff's apartments, the court made a mandatory order requiring defendant to open up the pipes and permit the flow of water to the plaintiff's premises. This was held correct.[1]

An important case upon this subject was decided by the Supreme Court of Appeals of West Virginia.[2] There the municipal government had granted a license to a railroad company to build its road across, along, and upon a street, upon certain conditions fixed by the ordinance requiring the company to restore the street, and do certain work in connection therewith, necessary for the preservation of the street and its usefulness as a public highway. The company constructed its road, but failed to do the work necessary to restore it, and left it so impaired as to render it dangerous to use. The city filed its bill in equity asking a mandatory injunction to the company to put the street in certain order, and to do certain work according to the requirements of the ordinance granting the license. Relief was granted as prayed. Answering the contention that the city had an adequate remedy either by mandamus, or by an action for damages, the court said: "What the city needs is specific performance by the railroad company, of the duty resting upon it, and no other relief is effectual. It is now settled that injunctions are not only, as is usually the case, preventive or prohibitory, but also mandatory, commanding positive or affirmative action to be taken or done by the defendant, as mandamus does at law. At one time the mandatory injunction, because injunctions had always been couched in prohibitory language, was framed in that form only by prohibiting the doing or continuing to do a given thing, thereby compelling the party to do the thing which it was desired he should do, because by continuing to do as he had done he became liable to punishment; but in later times this species of injunction has lost this delicacy, and now, when used, assumes the form of command to do a specific act." The jurisdiction was sustained, and the decree affirmed. The case is an important one, and marks the

[1] Brauns *v.* Glesige (1891), 130 Ind. 167.

[2] City of Moundsville *v.* Ohio River R. R. Co. (1892), 37 W. Va. 92; 20 L. R. A. 161, with note.

advance which is being made to make remedies more direct and effectual.

Reference has already been made to Toledo, A. & N. M. Ry. Co. *v.* Pennsylvania Co.[1] That case has since been cited with approval, and followed several times.[2] The effect of the injunction in that case was to require the defendants to perform their duty under the third section of the Interstate Commerce Act. It was negative in form, and enjoined the defendants from refusing to offer and extend to the plaintiff company the same equal facilities for interchange of traffic on interstate business between the defendant companies and the plaintiff, as are enjoyed by other railway companies, and from refusing to receive from plaintiff company cars billed from points in one State to points in another State, which might be offered to the defendant companies by the complainant; and from refusing to deliver in like manner to the complainant cars which might be billed over its line from points in one State to points in another State. The case arose out of the refusal of the defendant companies to handle such cars for the plaintiff company, because certain of their employees had declared a boycott against the defendant companies. The injunction was granted upon the filing of the bill, and although negative in form, it was mandatory in effect, and is spoken of by Judge Ricks as a mandatory injunction.

Upon the principle of this case, the employees of another railroad company, who had refused to perform their usual and customary duties, were required by a preliminary mandatory injunction to perform all of their regular and accustomed duties so long as they remained in the employ of the complainant company. The refusal of these employees to handle Pullman cars on its road, as it was bound by contract to haul them, had the effect to interrupt interstate commerce and the transmission of the mails, and subjected the company to suits and great and irreparable damage.[3]

The flexibility, usefulness, and efficiency of this writ is shown by a recent case in Minnesota.[4] The complainant in that case was the trustee in a railroad mortgage, given to secure bonds to the amount of $5,000,000. The defendant had recovered a judgment

[1] (1893), 54 Fed. Rep. 746.

[2] See Farmers' Loan & Trust Co. *v.* Northern Pac. R. R. Co. (1894), 60 Fed. Rep. 803, 814; Southern Cal. Ry. Co. *v.* Rutherford (1894), 62 Fed. Rep. 796, 797.

[3] Southern Cal. Ry. Co. *v.* Rutherford (1894), 62 Fed. Rep. 796.

[4] Central Trust Co. of New York *v.* Moran (1894), 56 Minn. 188; 57 N. W. Rep. 471.

against the railroad company, and caused a levy to be made on an execution which had been issued upon his judgment, upon two locomotives and two passenger coaches, and these were advertised for sale under the levy. The levy itself was wrongful, because it was the law of Minnesota that the roadbed, franchises, rolling-stock, etc., of the railroad company were an entirety, and could not be separately levied on. The complainant's lien and right was to the entire property, and the sale of these locomotives, as well as their being held in the custody of the sheriff, tended to inflict an irreparable injury upon the company as well as upon the complainant. A preliminary mandatory injunction, requiring the defendants (the execution creditor and the sheriff) to restore the engine and cars to the railway company, and restraining them from making the sale, was granted, and the order was affirmed.

The tendency to extend the remedy by mandatory injunction in proper cases is illustrated also by a recent case in Oregon.[1] There a dispute had arisen as to the true boundary line between plaintiff's and defendant's lots in the city of Portland. Plaintiff had erected an expensive frame building, and defendant claiming that it encroached an inch or two on his property, notified the plaintiff to remove the encroaching part. Plaintiff having failed to observe the notice, defendant cut down the parts that projected over the line, taking off the water table, window sills, sheathing, etc., of the projecting wall, and inflicting a damage of $1,750 to the plaintiff's house. Defendant then began the construction of his improvements, and started the foundation under the surface up to the line which he claimed to be the true dividing line, but as the wall was raised, it projected an inch beyond this line. Plaintiff promptly applied for a mandatory injunction to compel defendant to remove that portion of the wall that projected beyond the line claimed by plaintiff to be the true dividing line, and for damages to her building. The line claimed by plaintiff was found to be the true dividing line. No temporary injunction was granted, but on a trial of the merits a perpetual mandatory injunction was awarded, with a judgment for damages for $1,750.

The subject is considered with care and learning by Moore, J., who in discussing the matter said: "The question is whether the plaintiff will suffer irreparable injury, and, if so, has she a plain and adequate remedy at law. If in an action of ejectment the wall cannot be removed, the injury resulting from its erection could not

[1] Norton *v.* Elwert (1895), 29 Oregon, 583; 41 Pac. Rep. 926.

be compensated by any measure of damages, however great the sum which a jury might award, for it would, in effect, amount to a condemnation of the plaintiff's property, and an appropriation of it to the defendant's private use; and to concede that even so small a strip of plaintiff's premises could be thus taken would be to admit a rule of law which must necessarily be almost limitless in its application. In an action at law it would be difficult for the plaintiff to regain possession of that portion of her land occupied by the wall; for the sheriff, when called upon, might well hesitate to execute a writ commanding a restoration of the premises, since he must cut the wall to the division line, and in doing so he might take more than the 'merchant's pound of flesh,' and thus render himself liable in damages to the defendant. Baron *v.* Korn, 127 N. Y. 224 (27 N. E. Rep. 804). The removal of the wall being difficult, the plaintiff has no plain remedy at law. In all such cases equity will, upon the theory that wherever there is a right there is also a remedy, interpose and grant complete relief, and for that purpose will, where there has been no unreasonable delay in seeking the relief, award a mandatory injunction, and place the obligation of removing the structure upon the party who causes it to be erected."

Many other instances of mandatory injunctions, both interlocutory and final, might be given, but that would not only extend this paper beyond the reasonable limits to which it is entitled in your proceedings, but try your patience beyond a reasonable degree. The cases all proceed upon the principles I have endeavored to state and explain. No one can arise from an examination of these authorities without being impressed with the dignity, the grandeur, and splendid efficiency of that system of remedial jurisprudence, which has grown up in the course of years, as the result of the genius and labor of the most remarkable galaxy of great men known to the juridical history of the world, that splendor of our English and American law, which we call equity.

Jacob Klein.